REMARKS

I. Introduction

Claims 1 – 12 are presently pending, and are rejected. Following entry of the present amendment, claims 1, 4, 8, and 10 are amended, new claim 13 is presented, and claims 2, 3, 5 - 7, 9, 11 and 12 are canceled

Support for the amendment to claim 1 may be found in claims 3, 5, 6 (now canceled), at page 2, lines 8 – 11, and at page 2, lines 29 – 30. Support for new claim 13 may be found at page 8, lines 16 – 21. It is believed no new matter has been added. Support for the amendment to claim 10 may be found at page 8, line 10 (see also amendment to the specification *infra*). Claims 8 and 10 have also been amended to clarify claim language.

The specification has been amended at page 2, line 30 to correct the typographical error of "contract' to "contrast". Applicants thank the Examiner for identifying the typographical error.

The paragraph at page 8, lines 6 – 15 has been amended to replace "humidity" with "moisture content", which is a more accurate translation of the French word "humidité" as used in the context of the specification.

II. 35 USC § 102 rejections

A. Claims 1, 2 and 11 are rejected under 35 USC 102(b) as being anticipated by Baugher et al. (US 4,098,913). Applicants respectfully traverse the rejection; however have amended claim 1 (e.g., incorporating the limitations of claims 3, 5 and 6), and request the rejection be withdrawn.

B. Claims 1, 4 and 11 – 12 are rejected under 35 USC 102(b) as being anticipated by Willi et al. (US 4,363,824). Applicants respectfully traverse the rejection; however have amended claim 1 (e.g., incorporating the limitations of claims 3, 5 and 6), and request the rejection be withdrawn.

III. 35 USC § 103 rejections

A. Claims 1 – 5, 7, and 9 – 12 are rejected under 35 USC 103(a) as being unpatentable over Itagaki et al. (EP 0564787).

Applicants respectfully traverse the rejection; however have amended claim 1 (e.g., incorporating the limitations of claim 6), and request the rejection be withdrawn.

B. Claims 6 and 8 are rejected under 35 USC 103(a) as being unpatentable over Itagaki et al. in view of Duffett (WO 98/13133).

The Examiner finds Itagaki et al. discloses confectionery fat compositions containing from 20% to 80% cocoa butter, and thus the Examiner considers that these compositions contains essentially cocoa butter; however, Itagaki is silent as to the composition being a powder or dry form. The Examiner also finds that spray dried powders, including spray dried fat compositions were known at the time of invention, and Duffett teaches that granulated products, including cocoa butter and fats, are more convenient to store. Thus, the Examiner asserts it would have been a matter of routine for one of skill in the art to modify Itagaki and spray dry the confectionery fact composition based on the teachings of Duffett, in order to make a confectionery fat composition that can be stored for longer periods of time, and thus practice the presently claimed invention.

Applicants respectfully submit that a prima facie case of obviousness has not been established over the claims as presently amended, and request the rejection be withdrawn. The obviousness determination requires four kinds of factual inquiries:

(1) the scope and contents of the prior art;

(2) the differences between the prior art and the claims at issue;

(3) the level of ordinary skill in the pertinent art; and

(4) any objective indicia of success such as commercial success, long felt need, and copying.

KSR Int'l. Co., 127 S. Ct. at 1735 (citing *Graham v. John Deere Co.*, 383 US 1, 17-18 (1966)).

1. The scope and content of the Prior Art and Differences Between the Prior Art and Claimed Invention:

The present invention is directed to a non-gelling gelatin substitute product. The composition is essentially vegetable fat of at least 99 weight % cocoa butter deodorized to an extent of 90-95%, and is in the form of a powder.

Itagaki discloses confectionary fat compositions comprising from 20 to 80% by weight of a deodorized cocoa butter and from 20 to 80% by weight of hardened fats. Such compositions are suitable for sandwiching or filling in biscuits, cakes and bread, which is excellent in flavor, melting properties, texture, shape retention at ordinary temperature and whipping properties, has a sharp meltability in the mouth. Itagaki emphasis the unsuitability of cocoa butter alone for these purposes, and the compositions disclosed additionally require the presence of 20 - 80% hardened fat with a melting point of 45°C or lower.

Duffett discloses methods of producing crystals of fat. A substance (solid at room temperature) is obtained in liquid form. The liquid is atomized, and the atomized liquid is rapidly cooled so that at least partially solid particles are formed. One aspect of Duffett is a method of making chocolate. Cocoa butter or cocoa mass is obtained in liquid form, atomized, and the atomized liquid is rapidly cooled to form a powder, which is added during the chocolate making process as part of the crumb making process or at the conching/tempering stage of chocolate production. Pages 12 – 13.

2. The Obviousness Determination:

Itagaki and Duffett fail to teach or suggest all of the limitations of the claims.

As previously stated, the present invention is directed to compositions of essentially a vegetable fat of at least 99 weight % cocoa butter deodorized 90 – 95%, and is in the form of a powder. Neither reference teach or suggest any composition having at least 99 weight % cocoa butter, any composition having cocoa butter which has been 90 – 95% deodorized, or a non-gelling vegetable fat to replace gelatin.

There is no reasonable expectation of success or motivation in practicing the claimed invention based on the disclosure of Itagaki and Duffett.

A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention. *W.L. Gore & Assoc. Inc. v. Garlock, Inc.*, 721 F.2d 1540 (Fed. Cir 1983).

Itagaki discloses cocoa butter needs to be tempered, but fat compositions which are tempered can hardly be whipped because of the fat crystal content. Page 2, lines 11 – 19. Accordingly, Itagaki solves this problem by incorporating 20 to 80% by weight of a hardened fat into the compositions. Based on a fair reading of Itagaki, one of skill in the art would not be motivated to produce a composition having 99% cocoa butter, much less in powder form, as such compositions are clearly unsuitable for uses contemplated by Itagaki. Applicants respectfully submit that Itagaki actually teaches away from the present invention by incorporating 20 – 80% hardened fat into the compositions, as the incorporation of such hardened fats results in, at most, compositions containing 80% cocoa butter.

The teachings of Itagaki and Duffett cannot be combined. "If proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification." *In re Gordon*, 733 F.2d 900 (Fed. Cir. 1984).

Itagaki discloses cocoa butter needs to be tempered, but fat compositions which are tempered can be hardly whipped because of the fat crystal content. Page 2, lines 11 – 19. Accordingly, Itagaki produces fat compositions without tempering to avoid the formation of crystals, i.e., by adding a hardened fat to cocoa butter. In contrast, Duffett discloses methods of producing crystals of fat. Page 1, lines 14 – 17. Applicants respectfully submit that the references cannot be combined, as Itagaki et al. seeks to produce compositions which have excellent whipping properties by avoiding the formation of fat crystals, while Duffett is producing fat crystals.

Finally, it is submitted that Itagaki cannot use a powder. The object of Itagaki is to provide a confectionary fat composition containing cocoa butter which is excellent in shape retention at ordinary temperature and whipping properties. It is submitted that a powder does not have shape retention, and whipping a powder of crystallized fat is contrary to the teachings of Itagaki.

3. Conclusion:

It is clear that the presently amended claims are not obvious over Itagaki in view of Duffett. Neither references teach or suggest all of the claim limitations, alone or in combination. Moreover, there is no motivation or reasonable expectation of success in practicing the claimed invention, as Itagaki teaches away from the present invention, and the teachings of Itagaki and Duffett cannot be combined. As the rejection under 35 USC § 103(a) is improper, Applicants respectfully request that it be withdrawn.

V. Summary

Applicants have made a *bona fide* attempt to address all matters raised by the Examiner. Applicants respectfully submit that the application is now in condition for allowance, and therefore respectfully request that the outstanding rejections be withdrawn and that a Notice of Allowance be issued. If any remaining matters need to be resolved, Applicants respectfully request an interview with the Examiner prior to any official action being taken by the Office in response to these arguments and amendments in order to facilitate allowance of the pending claims.

It is believed no fee is presently required. If a fee is required, please charge the same to Deposit Account 50-4255.

Respectfully submitted,

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By _____

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